

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

Original

77-1449

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

-against-

ROBERT T. LOEWY,

Appellant.

*On Appeal From The United States District
Court For The Southern District of New York*

APPELLANT'S BRIEF

JERALD ROSENTHAL
Attorney for Appellant
310 Warren Street
Brooklyn, N.Y. 11201
(212) 625-2290

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

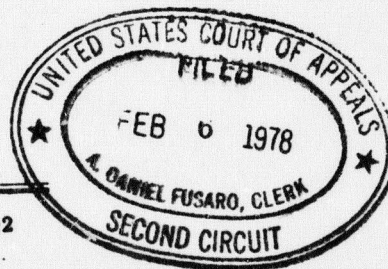


TABLE OF CONTENTS

	<u>Page</u>
Preliminary Statement	1
Questions Presented	2
Facts	2
POINT I - Testimony was Insufficient for Conviction of Obstruction of Justice	12
POINT II - In Charging The Jury, The Court Inadequately Defined The Standards Necessary For Conviction	15
Conclusion	18

TABLE OF CASES

	<u>Page</u>
U.S. v. Atrams, 427 F.2d, 86, 88 (2d Cir. 1970)	17, 18
U.S. v. Alo, 439 F. 2d 751, 754 (2d Cir. 1971)	12
U.S. v. Cloffi, 493 F. 2d, 1011, 1018, 1019 (2d Cir. 1974) . . .	12
U.S. v. Fayer, 523 F. 2d 661, 663 (2d Cir., 1975)	12
U.S. v. Slofsky, 527 F. 2d 737, (2d Cir. 1975)	12

AUTHORITIES

U.S.C. Title 18, 1505	1, 15
U.S.C. Title 18, 1500-1510	12

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

ROBERT T. LOEWY,

Appellant

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction entered the 14th day of October 1977 after a jury trial in the United States District Court for the Southern District of New York, Honorable Charles L. Brieant, presiding. Appellant was convicted of obstruction of justice, a violation of U.S.C. Title 18, 1505. A mistrial was declared as to the remaining counts in the indictment charging mail fraud and conspiracy - the jury being unable to arrive at a verdict as to those counts.

As a consequence of appellant's conviction he was sentenced to a term of imprisonment for a period of one (1) year and one (1) day. Appellant is presently free on bail pending appeal.

QUESTIONS PRESENTED:

1. Whether the evidence presented was sufficient to convict appellant of obstruction of justice?
2. Was the Court's charge to the jury regarding the standard to be applied to convict appellant of obstruction of justice adequate?

FACTS:

Benjamin Loewy had set up a business for himself and his son appellant, Robert T. Loewy (296)*. This business was known as Corporate Advisory Counsel (297). Its main service - relying on Benjamin Loewy's expertise in marketing - was to aid small corporations in need of capital of acquiring it and to aid them in marketing their product (298).

Alan Becker, a college dropout, holding himself out as Dr. Becker - having acquired this degree and identity from another Alan Becker after our Alan Becker had examined N.Y.U. Yearbooks to find a Ph.D bearing his name - was in need of money to manufacture and market an insecticide - methoxychlor- for which he ascribed the name Emtex (50, 51, 54, 173-177, 180, 184, 187-189). This insecticide was to be a replacement for DDT - due to be banned by the United States Department of

*() Refers to pages of the trial testimony.

Agriculture. Emtex or methoxyclo~~r~~ was an old product. Becker had merely coopted the product and a new method of manufacture from Vista Chemical Company for whom he had been employed. (52-54). Realizing that \$20,000 that he had scraped together from savings and from friends was not enough money or his purpose, Becker attempted to sell stock in his corporation Ecological Manufacturing Association to the New Jersey public without authorization. A cease and desist order put an end to the sales (168, 169).

Becker then came to Corporate Advisory Counsel and spoke to Benjamin Loewy and the appellant, (55, 56). A public offering under Regulation A - for under \$500,000 was suggested (57). Becker agreed (59-63). He would compensate Corporate Advisory Counsel \$14,000 to hire attorneys, the underwriters, and to take care of all the details of a public stock offering. In addition, Becker's corporation would hire Corporate Advisory Counsel for a period of three (3) years to perform marketing services (58-61). To effectuate the agreement a new corporation Ecological Manufacturing Corporation was formed in New York with authorized stock of 200,000 shares, an attorney Arthur Kronenberg was hired, an underwriter Interstate Equities was engaged, and an offering circular was prepared (64-67).

Interstate Equities went out of business and a new underwriter Carlton-Cambridge was found (68-70). However Carlton-Cambridge was not interested in selling Ecological Manufacturing corporation stock (turning down \$50,000 compensation for selling the stock) (77-80). They would only lend their name to the offering circular as an accommodation for the sum of \$1,000 (71). Consequently Ecological Manufacturing Company could not sell the requisite number of shares within the allotted time it had to return subscriber's money held in escrow (80).

A chance meeting between Ernest Milchman, an attorney hired by Benjamin Loewy to represent the underwriters (whoever they may be) and two employees of Horizon Underwriters, Jack Rothman and Vincent Agostino, provided Ecological Manufacturing Company with another underwriter (258, 259, 316-318, 321-323). A meeting was arranged at Horizon offices with appellant, Benjamin Loewy, Becker, Rothman, Agostino, Milchman and the principals of Horizon, Thomas and Joseph DeFillipo attending. (324, 325). After a discussion concerning whether Horizon would undertake the public offering of Ecological Manufacturing Corporation stock among all present, Joseph DeFillipo, Rothman and Agostino went into a closed room leaving appellant and the others to wait outside (325, 326). When Joseph DeFillipo, Rothman and Agostino concluded their meeting in the back room, a discussion was held between Becker, Benjamin Loewy and Joseph DeFillipo. Appellant was excluded from this discussion. As a result Joseph DeFillipo was offered

\$55,000 as a support for the after market of the stock - whereby Horizon would be able to buy Ecological Manufacturing Company stock from its customers at a price higher than the initial offering thereby allowing them a small profit on the stock while the remainder of unwitting subscribers would be then left to the mercy of the market (260, 263). An additional incentive of a loan and a 10% commission was also agreed to in the discussion between Benjamin Loewy, Rothman, Agostino and DeFillipo. Appellant was also excluded from this discussion (327).

The details of this arrangement was not included in the offering circular (267, 327). According to Becker's trial testimony this circular was prepared by Benjamin Loewy and appellant. However all previous testimony, the grand jury, SEC and a proceeding before Judge Cannella, it was Benjamin Loewy alone who prepared the offering circular (238-243). However, included in the offering circular was a provision for a \$3,000 finder's fee to Jack Oxman, a friend of Benjamin Loewy (268, 269). Oxman did not find anything (75, 76, 303). There was a prearranged agreement between Benjamin Loewy and Oxman that Oxman would remit \$2,500 of the \$3,000 to Benjamin Loewy (300-306).

On July 7, 1972 Horizon had succeeded in selling the required amount of shares of Ecological Manufacturing Corporation (92). Legal expenses of the underwriting in the amount of \$35,000 were paid to Kronenberg. \$25,000 went to Corporate Advisory Counsel. Two monthly payments in the sum of \$2,100 each in part payment of the marketing service to be provided by Corporate Advisory Counsel was also handed over to Benjamin Loewy (93-96, 104, 105). A check for \$55,000 made payable to Stanley Goldfoot of Icoram, Inc. was also given to Benjamin Loewy (96-98). Becker testified that the \$55,000 payment to Stanley Goldfoot of Icoram was for chemical equipment and supplies belonging to Becker, monies to be used to support the after market of Ecological Manufacturing Corporation stock (99-102). In addition \$50,000 went for the purchase of United States Treasury Notes. This purchase was made by Ecological Manufacturing Corporation's then attorney Milchman. These monies according to Becker were to be divided between Benjamin Loewy, Milchman, Joseph DeFillipo, Rothman and Agostino. Milchman excluded Benjamin Loewy (329). However the notes were never cashed and the money reverted to Ecological Manufacturing Corporation in December of 1972, (106-110).

During the 60 day period of the Ecological Manufacturing Corporation's stock offering, Becker was passing himself as Dr. Becker on radio shows and in the press (184, 187). Emtex was characterized as a wonder insecticide which Becker had tested under government supervision (185, 186). This

deception came to life when the periodical National Observer printed an article labelling Emtex and "Dr. Becker" as a fraud. (110, 111, 171). In addition Becker had rented an apartment in Manhattan with Echological Manufacturing Corporation's funds. (194, 195).

Shortly after the National Observer article, an SEC investigation was started. (111, 112). Lest the corporate records of **Echological** Manufacturing Corporation reveal Becker's fraud, certain check stubs were altered (112, 113). According to Becker's SEC testimony, grand jury testimony and his testimony at a proceeding before Judge Cannella, these changes were made at the behest of Benjamin Loewy. At the trial Becker included appellant as a culprit - excusing the omission at the previous proceedings as an oversight; whenever Benjamin Loewy was mentioned, it was Becker's intention to include appellant (205, 206, 211). Therefore, Becker's alteration of the check stub showing payment of \$25,000 to Corporate Advisory Counsel characterizing the payment to be for development of marketing program, provision for which had been made in the offering circular, was not merely a change to reflect the true nature of the payment but was a deception perpetuated by Benjamin Loewy and the appellant together (114). According to Becker this legitimate charge was again altered to show that Corporate Advisory Counsel received a commission on the purchase of janitorial supplies from Lawlor Industries, a transaction that was easily exposed as a fraud by Harold Woodward of Lawlor - the

documentation not on Lawlor's printed purchase order (116-122, 152-160).

Becker attested to still another alteration of that check stub - this time to reflect the payment to **Transamerican Marketing Corporation** for developing of marketing. According to Becker **Transamerican was another corporation controlled by Benjamin Loewy and appellant** (123, 129, 130). Nat Weisman was hired to aid Benjamin Loewy in the preparation of a marketing program (122). A marketing program was prepared, with Mr. Weisman submitting his bill for services to **Ecological Manufacturing Corporation** with Becker sending the bill to Benjamin Loewy (128, 129). Since the Lawlor invoice signed by Benjamin Loewy was no longer needed, Benjamin Loewy instructed Becker to destroy it. Becker, this time did not follow Benjamin Loewy's instructions as was his wont in regard to other instructions given him by Benjamin Loewy (120). Other check stubs altered by Becker were the \$55,000 check to **Goldfoot and Icoram** for lab equipment which was changed to deposit on purchase equipment and the \$2,100 payment to Corporate Advisory Counsel where the words "management consultation" was added to services rendered. It is Becker's testimony that **any** payments were altered by Benjamin Loewy in September 1972 with instructions **that they be** resumed after the investigation. However, the SEC did not commence its investigation until October 1972 (124-128).

In November 1972 at Corporate Advisory Counsel offices - being used by Becker as **Ecological** Manufacturing Corporation offices - Benjamin Loewy expressed concern as to the appearance of the Goldfoot-**Icoram** transaction; \$55,000 for laboratory equipment (130, 131). That check had been cashed by **Icoram** and **Icoram** had issued a \$50,000 check to Horizon which was turned over to Joseph De Fillipo by Benjamin Loewy. These funds were needed by Joseph DeFillipo to support his faltering investment company (264, 276, 277, 283). In return Joseph DeFillipo gave Benjamin Loewy his personal note (284, 285). However, when the note came due in November of 1972 Joseph De Fillipo was unable to repay the monies (286, 287). Another loan was arranged between Benjamin Loewy and Joseph DeFillipo whereby the first loan for \$55,000 would be paid off through **Icoram** (Goldfoot) and \$50,000 advanced to Nova Equities, the parent company of Horizon Securities, for their debentures. Becker's puffery of Emtex had succeeded in creating public interest in Emtex and had therefore made the monies set aside to support the after market of the stock unnecessary; **Ecological** Manufacturing Corporation was selling at above the original offering price (288). It was Becker's testimony that Benjamin Loewy instructed him to prepare a certified check payable to Nova Equities. Becker claims ignorance as to the purpose of this transaction. (131-134). According to Joseph DeFillipo's testimony when

Becker and appellant delivered the check to him, it was Becker who told Joseph DeFillipo that he had the check to buy Nova debentures (133, 134, 142, 389). Appellant's participation as expressed to Joseph De Fillipo was to accompany Becker and Joseph DeFillipo to the bank to make certain that the monies would be drawn out in a check payable to **Icoram** (289, 290). Joseph however gave the \$50,000 check to his brother Thomas to deposit and he drew a check payable to **Iccoram**. Becker was then given a letter as a receipt for the \$50,000 loan (290). Becker's version has Joseph DeFillipo giving appellant something in return for the \$50,000 certified check with appellant and Becker going to the Chase Manhattan Bank at 3rd Avenue and 57th Street where this something was converted into a bank check which Becker took (133, 134). And according to Becker the \$50,000 return to **Ecological** Manufacturing Corporation was to be divided among Benjamin Loewy, Becker, Milchman and Horizon (140). As part of the **Icoram-Goldfoot** transaction, a letter was dictated to show the return of the money. Another letter was dictated to show the manner in which the money had been taken from the firm. Benjamin **Loewy** instructed Becker to destroy the originals and keep the carbons. Becker again disobeyed Benjamin Loewy (144-148).

These revelations were kept from the SEC by Becker when he first testified in November of 1972 (172). At the SEC hearing he continued the deception he had been perpetrating on appellant, his father and the public, averring to a Ph. D. and supplying the SEC with documentation of another Alan Becker who held a PH. D. in education from N.Y.U., maintaining that Emtex had been tested under government supervision, when in fact, tests of another product having no connection with Emtex were done by the government (173-189). It was not until February 1973 after Becker had been exposed as a fraud, that he admitted the falsity of his testimony at the previous SEC hearings and the misrepresentation of his product in the offering circular (162). Becker then related his story to the SEC excluding reference to appellant. According to Becker's testimony at the SEC as well as his testimony in the grand jury and at a proceeding before Judge Cannella, it was Benjamin Loewy that supervised the alteration of the check stubs and manipulated the Goldfoot-Icoram transaction - Becker's trial testimony merely notes the presence of appellant at these transactions (203-214, 221, 223, 234, 235, 238, 239, 241-243).

POINT I:

TESTIMONY WAS INSUFFICIENT FOR
CONVICTION OF OBSTRUCTION OF JUSTICE

In order for appellant to be found guilty of obstruction of justice the prosecution must prove "a corrupt motive", U.S. v. Fayer, 523 F. 2d 661, 663 (2d, Cir. 1975). It has been held that the "key words" of the obstruction of justice statutes Title 18 U.S.C. 1500-1510 are "corruptly" and "endeavors"; U.S. v. Cioffi, 493 F. 2d 1011, 1018, 1019 (2d, Cir. 1974). And in that regard a corrupt intent must be proved. U.S. v. Slofsky, 527 F. 2d 737 (2d, Cir. 1975).

"...Sec. 1505 deals with the deliberate frustrations through the use of corrupt or false means of an agency's attempt to gather relevant evidence." (U.S. v. Alo, 439 F. 2d 751, 754 (2d, Cir. 1971)).

Testimony at the trial merely shows appellant to be a "messenger"; his presence merely noted at certain meetings where aspects of Ecological Manufacturing Corporation's public offering were discussed only to be excluded when anything unsavory was discussed. When appellant partook of these discussions they were involved with legitimate corporate business.

When Becker approached Corporate Advisory Counsel to finance Emtex, appellant was included in the discussions. There was nothing corrupt about Becker paying \$14,000 of his own money to Corporate Advisory Counsel to institute a public offering. Nor was there anything corrupt or underhanded in

hiring attorneys, underwriters and aiding in the preparation of the offering circular. A \$25,000 payment to Corporate Advisory Counsel for **marketing program** - relying on Benjamin Loewy's expertise - was provided for in the offering circular.

As to the transactions that were not reflected in offering circular or were misrepresented, there is no evidence that appellant had knowledge of these. Jack Oxman's finder's fee of \$3,000 - \$2,500 of which reverted to Benjamin Loewy

- was between Benjamin Loewy and Oxman. And the **Icoram-Goldfoot** transaction where \$55,000 was paid to Goldfoot or **Icoram** for lab equipment that Becker claims to have already owned - monies to be used to support the after market price of **Ecological** Manufacturing Corporation stock - appellant was excluded from these conversations - the participants included Becker, Milchman, Benjamin Loewy, Joseph DeFillipo, Rothman and Agostino. And the record is bereft of any evidence that appellant had knowledge that the Goldfoot-**Icoram** transaction for the purchase of laboratory equipment was anything but a legitimate purchase. That the **Icoram** Goldfoot monies were used to **houy** up Horizon's precarious financial position was also kept from appellant.

It was only appellant's appearance at Horizon's office with a certified check drawn on **Ecological** Manufacturing Corporation for \$50,000 that involved him at all with this transaction. Appellant's diligence in making certain that

the monies to cover the check were returned to Ecological Manufacturing Corporation is as ambiguous as his presence at Corporate Advisory Counsel when his father counselled the alteration of Ecological Manufacturing Company's check stubs. Even there it was not shown that these alterations were anything but an attempt to more clearly state legitimate corporate transactions - changes made one month prior to any SEC investigation. Similarly, there was no restriction on Ecological Manufacturing Corporation advancing Nova or Horizon corporate monies. Any claimed future division of the spoils did not include appellant as a participant.

Much might have been done to impede the SEC investigation. Becker lied to the SEC, provided false documents, and generally subverted the SEC's attempt to uncover the truth. That Becker might have been aided by appellant's father or Ecological Manufacturing Corporation's attorney Milchman, or the members of Horizon in no way imputes knowledge of their corruption to appellant. In the words of one corrupter, Joseph DeFillipo, appellant was merely a "messenger." See U.S. v. Turcotte, 515 F. 2d 145 (2d Cir., 1975).

POINT II:

IN CHARGING THE JURY, THE COURT INADEQUATELY
DEFINED THE STANDARDS NECESSARY FOR CONVICTION.

The court charged the jury as to count
12 of the indictment involving a violation of Title 18 U.S.C.
1505, as follows:

"In order to find the defendant Robert R. Loewy guilty of the crime charged in count 12 of the indictment, you must find the following elements beyond a reasonable doubt; and here again the elements of this count are different because its charged under a different statute:

"First, that on or about the dates named in the indictment, that is from in or about September 1972, up to and including June 2, 1977, a department or agency of the United States was conducting a proceeding under the laws of the United States. In this connection, I instruct you that an investigation conducted by the Securites and Exchange Commission, SEC, is a proceeding before a department or agency of the United States; and it has been stipulated that the Securities and Exchange Commission was conducting an investigation into the affairs of **Ecological** Manufacturing Corp., and that this was properly authorized by the laws of the United States and that they were calling in witnesses and taking testimony."

"Second, that the defendant Robert T. Loewy had reasonable grounds for believing and did believe that such a proceeding was taking place before the Securities and Exchange Commission, and, third that the defendant, Robert T. Loewy did corruptly endeavor to obstruct or impede this proceeding by covering up payments from and uses of the proceeds of the public offering of EMC stock, which payments and uses had not been disclosed in the offering circular for the public offering. "

"The word 'corruptly', members of the jury, encompasses any evil intent on the part of the defendant to impede or obstruct the due administration of justice in the SEC investigation of Ecological. This corrupt intent needn't be the only motive for the defendant's actions so long as you find it is one of the motives for his actions. The purpose of the law is to prevent a miscarriage of justice by corrupt methods and the statute extends to any corrupt endeavor to obstruct or interfere with the due administration of justice by the use of trickery, schemes or devices such as a cover-up or the falsification of documents."

"Count 12 also charges the defendant under the aiding and abetting statute and everything I told you about the aiding and abetting statute in connection with the securities frauds count, is equally applicable to this count, so if the defendant Robert T. Loewy knowingly aided or abetted or procured or induced another person, specifically Benjamin Loewy, to obstruct justice as charged in count 12 by fabricating the documents to cover up payments, then the defendant himself is guilty of committing an illegal act also."

"One who knowingly and willfully fabricates documents such as checks or invoices or agreements or marketing studies or bills and shows such fabricated documents to the SEC in an attempt to impede that agency's investigation into the true facts surrounding the public offering and related subsequent transactions, has violated Section 1505 of Title 18 U.S.C., which I stated to you; and the obstruction said to consist in the restructuring of documents involving use of the public offering proceeds, first it was alone, and later as a marketing survey; and it's contended by the government that this was done in order to conceal from the SEC the fact that the use of such proceeds were not as stated in the offering circular. These conventions are in dispute, and they are denied by the defendant, and he denies any culpability with respect thereto, and he presents a factual question which is for your decision." (477-480)

After defense counsel excepted to that portion of the Court's charge, the charge was amended as follows:

"Members of the jury, there is one additional point in connection with count 12 which I want to make completely clear and emphasize to you. It is an essential element of that crime that by covering up or fabricating papers or aiding and abetting in doing so, if he did do any of that, that defendant must have had the specific criminal intent to obstruct or impede the investigation of the SEC.

"That must have been his purpose in doing whatever he did so. It is not in violation of this particular statute merely to cover up or fabricate documents or alter the appearance of the records of Ecological. It would not be criminal under this indictment as charged here unless in doing whatever you find he did, he had the specific criminal intent of making it harder for the SEC to complete its investigation or reach the true facts of the matter.

"That is what the word 'impede' means, to obstruct or stop or prevent or delay, and it's essential that his purpose in doing any alleged cover up should be directly related to the documents or matters which he thought at the time would become a part of the SEC investigation, and would be brought out as part of its inquiry." (488)

Neither charge is adequate. A key element is excluded from both charges; the necessity of a corrupt motive.

In U.S. v. Abrams, 427 F. 2d 86, 88 (2d Cir. 1970) this Court held:

"The trial court's charge which included an instruction to the effect that appellant must be found, beyond a reasonable doubt, to have acted, 'corruptly', defined as 'with improper motive, a bad and evil purpose', was adequate to apprise the jury that appellant could not be convicted for attempting to obtain what he believed to be a true statement."

Both charges in this case failed to meet the standard set forth in Abrams.

CONCLUSION:

APPELLANT'S CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

JERALD ROSENTHAL

ROSENTHAL

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 19 day of Jan., 1978 ~~XXXX~~ deponent served the within BRIEF upon

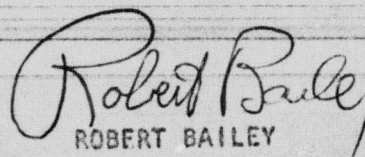
U.S. Atty., So. Dist. of NY

attorney(s) for
Appellee

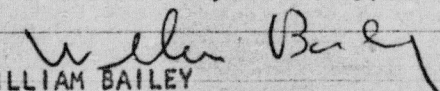
in this action, at

1 St. Andrews Pl., NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this 19 day
of Jan., , ~~XXXX~~ 1978


WILLIAM BAILEY

Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, 1978

